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No. 91-1295

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHARLES WAYNE ELMORE, Boatswain's Mate Third Class
United States Navy,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent's Brief in Opposition to the Petition for certiorari contains two factual inaccuracies and a significant legal analytical error. The Court should be aware of these points before deciding whether to grant certiorari in this case.

First, respondent incorrectly asserts that Petitioner and his missing wife "were seen driving toward the Navy pier . . . between 3:30 and 4:30 the morning of March 17." Brief in Opposition at 3. In fact, the gov-

ernment's witness, a Navy sentry named Crawford testified that: "I was standing there and it was on my 3:30 to 4:30 gate and I was standing and I saw a car, a white Mustang go by." Tr. 789. The witness did not testify to seeing *any* persons, but believed that it was Petitioner's car that he saw in the pre-dawn hours.

Second, respondent asserts that "Petitioner's claim . . . that the serologist ate breakfast with the panel members on the second day of trial is not supported by the record." Brief in Opposition at 12, n.11. In fact, Commander Smith, one of the members, admitted during *voir dire* that: "[The prosecutor's expert witness] sat at our table last night and this morning." Tr. 90. Commander Smith named three other members, Tr. 93, and stated that the breakfast lasted a "[h]alf hour maybe." Tr. 94. The record clearly supports the questions Petitioner presents to the Court, and all logical inferences contained in the petition for writ of certiorari.

Finally, respondent inappropriately relies upon *Tennessee v. Street*, 471 U.S. 409 (1985), while claiming that "There is no merit to petitioner's claim that admission of Bella's statements violated the Confrontation Clause." Brief in Opposition at 11, n.10. In *Tennessee v. Street*, the state introduced an accomplice's confession for the legitimate, *nonhearsay* purpose of rebutting Street's testimony that his own confession was a coerced "copy" of his accomplice's statement. In this case, the prosecutor specifically relied upon the alleged victim's out of court statements about her fear of Petitioner to prove the truth of the matters asserted therein. The trial court admitted the dozen statements under the erroneous theory that while they were hearsay, they were admissible under the "state of mind" exception to the rule prohibiting hearsay evidence. *Tennessee v. Street* is inapposite and the principles set out in *United States v. Brown*, and followed by 31 of the 38 jurisdictions that have addressed this issue, should apply to this case.

CONCLUSION

The Court should consider the above matters and for the reasons set forth in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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